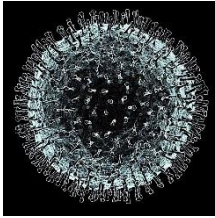




interpretation NOW!

Episode 59 – 29 April 2020



Are interpretation principles to be thrown out as we grapple with COVID-19? Some thoughts ... The legal system must be functional just as much in a pandemic or war as at other times – ‘amid the clash of arms, the laws are not silent’¹. Neither the statute book nor the principles for reading it are suspended by emergencies like COVID-19². The rule of law, of which those principles are a critical part, remains an ‘essential service’³. A coherent and apolitical system of interpretation capable of yielding reliable, consistent and clear answers in times of community stress is a national asset. An interpretive free-for-all (or black hole) will not advance the clarity or application of COVID-19 measures or the wider law. Political interpretation of legal text creates risks in any emergency situation. The more we understand and apply interpretation basics, the better might be our inputs into ongoing solutions to the crisis and recovery in the COVID-19 aftermath – **Gordon Brysland**.

text > context > purpose

[ASIC v King \[2020\] HCA 4](#)

Some may tire of the mantra – ‘text > context > purpose’ – but the High Court hasn’t. On who is an ‘officer’ of a corporation, the court said it was necessary to consider the provision⁴ ‘by reference to considerations of text, context and purpose having regard to the mischief at which it was directed’⁵.

As ‘overall boss’ of the parent company, K approved loan funding from a subsidiary to group creditors to the detriment of the fund it was to benefit. He was therefore an ‘officer’ of the subsidiary as he had the ‘capacity to affect significantly the [subsidiary’s] financial standing’. **iTip** – how the court does this is a tutorial on the basic mechanics of interpretation.

Principle of legality

[Hopkins v Minister \[2020\] FCAFC 33](#)

Legislation is presumed not to infringe fundamental rights/freedoms in the absence of clear language – the principle of legality⁶. The task is to identify some right or freedom, then test if it is ‘fundamental’.

H arrived here as an infant in 1967. 46 years later, his permanent visa was cancelled due to his substantial criminal record⁷. He argued for an ‘amplified common law right’ under international law not to be a ‘person’ to whom the Act could apply. This was rejected: ‘person’ includes all natural persons, and the power to cancel ‘unambiguously’ applied. There was no common law right ‘preferentially to choose’, and so the principle of legality had no application.

Compulsory acquisition

[Lawson v Minister \[2020\] NSWSC 186](#)

It was argued that the presumption against taking property without compensation⁸ prevented extinguishment of native title by legislation⁹. An intention to take must be ‘manifest’, something which requires ‘clear and unambiguous words’¹⁰. The provision said that the lands ‘are hereby vested in South Australia for an estate of fee simple ...’

Ward CJ rejected the argument (at [137]) saying that the presumption ‘was simply that – a presumption’. Although the word ‘vest’ may be of ‘elastic import’¹¹, an immediate taking without compensation was supported by text, context and purpose. Later land dealings could have no impact on interpretation.

Meaning of ‘subject to’

[Anastasiou v Wallace \[2020\] NSWLEC 14](#)

A development consent was ‘subject to’ the other provisions of the legislation¹². Pain J (at [44-45]) accepted this meant that consent provisions were subservient to the rest of the Act¹³. As there was no inconsistency, ‘subject to’ had no work to do.

Another recent case considers a water access licence ‘subject to’ certain irrigation requirements¹⁴. Robson J (at [190]) held that the phrase meant ‘akin to “in addition to”’ – that is, the licence was conditional on actual performance of the additional requirements¹⁵. These 2 cases show how the same phrase in different situations can take subtly different meanings. **iTip** – context and purpose hold the keys to meaning.

■ Credits – Stephen Churches, Jeffrey Barnes, Gordon & Oliver
¹ *Liversidge* [1942] AC 206 (at 244), cf *A v Arden* [2020] NZHC 796.
² cf *Roche* [2005] WASCA 4 (at [70]), *Hicks* [2007] FCA 299 (at [35]).
³ *Rakielbakhour* [2020] NSWSC 323 (at [13]), *Bares* [2013] FedJSchol 17 (at [42]).
⁴ Para (b)(ii) of the ‘officer’ definition in s 9 of the *Corporations Act 2001*.
⁵ *CLC Insurance* (1997) 187 CLR 384 (at 408), *PBS* (1998) 194 CLR 355 (at 381).
⁶ *Coco* (1994) 179 CLR 427 (at 437), *Lacey* [2011] HCA 10 (at [43-44]).
⁷ s 501(3A) of the *Migration Act 1958*.

⁸ *Clissold* (1904) 1 CLR 363 (at 373), *Fazzolari* [2009] HCA 12 (at [42]).
⁹ s 18 of the *River Murray Waters Act 1915* (NSW).
¹⁰ *ICM* [2009] HCA 51 (at [75]), *Mabo (No 2)* (1992) 175 CLR 1 (at 111).
¹¹ *Crystal* (1940) 64 CLR 153 (at 168), cf *Minerology* [2017] FCAFC 55.
¹² s 4.4 of the *Environmental Planning and Assessment Act 1979* (NSW).
¹³ *Medical* [2017] NSWCA 282 (at [87]), Pearce 9th ed (at [4.53]).
¹⁴ 2 weeks later in the same court – *Harris (No 3)* [2020] NSWLEC 18.
¹⁵ *Jones* (1988) 55 NTR 17 (at 21), *Akpata* [2003] FCA 1117 (at [10]).